

**B. Warrants and Similar Convertible Interests Should be Treated as Exercised for Purposes of the Eligibility Rule**

The Commission should also reconsider its apparent decision that warrants and other financial instruments with rights of conversion, held by incumbent LECs and cable operators, are not attributable for eligibility purposes until conversion is effected.<sup>47</sup> As the Commission found in its designated entity attribution rules, convertible securities “are generally considered to have a present effect on the power to control the concern.”<sup>48</sup> Given this finding, not attributing such interests to incumbents is indefensible. To the extent incumbent LECs and cable operators may freely hold warrants and other convertible instruments in LMDS licenses covering their service areas, the pro-competitive purpose of the eligibility rules can be largely frustrated. This is because the “one-two punch” of near-term ownership combined with covenants restricting licensee activities, which typically accompany warrants and other convertible interests, make it a practical certainty that the full range of competitive mischief feared by the Commission from substantial incumbent ownership can easily be achieved through these financial legerdemains.

- *First*, simple common sense dictates that an entity’s competitive zeal will be muted by the knowledge that several years hence, current management will owe their livelihood to the object of that competition. Thus, an LMDS licensee whose overall capital structure includes a substantial percentage of convertible instruments held by incumbents has a tremendous disincentive to aggressively compete with its future owners.

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<sup>47</sup> 47 C.F.R. § 101.1003(e)(5).

<sup>48</sup> 47 C.F.R. § 101.1112(d)(5). Thus, for purposes of determining designated entity status, convertible interests are generally treated as if “the rights thereunder had been exercised.” *Id.* The LMDS designated entity attribution rule for convertible interests was patterned after a similar rule adopted for the PCS C and F block auctions, which applies to “all agreements such as warrants, stock options and convertible debentures.” 47 C.F.R. § 24.709(b)(7). The LMDS rule, however, applies to “stock options, convertible debentures, and agreements to merge,” without making mention of “warrants.” The Commission should clarify whether the omission of warrants was an oversight, or whether warrants will not be attributable for LMDS designated entity purposes. In either case, the Commission’s observation in the LMDS rules that stock options and convertible debentures have a present affect on the power to control, applies with equal force to warrants that are convertible to stock interests.

- *Second*, even if such an LMDS licensee were willing to risk competing with its future owners, covenants commonly used with warrants and convertible debt which substantially restrict licensee activities, may effectively prevent the LMDS licensee from aggressively competing.<sup>49</sup>
- *Finally*, bidding oversight boards (and similar devices used in prior auctions to protect outside investors against adverse bidding outcomes) can be used, conversely, by an incumbent LEC or cable operator with substantial convertible holdings, to ensure that LMDS licenses in the incumbent's territory are acquired at any price. Once acquired, the combination of convertibility and covenants virtually assures that such licenses will be underutilized, and certainly not used to compete with the incumbent's monopoly services.

For these reasons, warrants and similar convertible securities should be treated on a fully diluted basis -- as though the rights thereunder had been exercised -- in determining whether they are attributable under the eligibility rule.

**C. The Commission Should Set a Fixed LMDS Auction Date at No Later than Six Months from Today**

The *Second Report and Order* defers a decision on the date of the LMDS auction to the Wireless Telecommunications Bureau under delegated authority.<sup>50</sup> This is inconsistent with the Commission's promise, reinforced by the relevant Congressional committees, to rapidly bring LMDS to market.

The Commission has been "on the verge" of scheduling LMDS auctions for more than two years, a delay that has not escaped the attention of the Senate and House Commerce

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<sup>49</sup> For example, assume an incumbent LEC or cable operator finances an otherwise eligible entity to acquire LMDS licenses in their service territories. The incumbent is granted warrants which include covenants requiring the warrant-holder's approval for future debt or equity offerings. Such covenants could effectively insure the incumbent against competition from the LMDS licensee by allowing the incumbent to veto investments in system buildout that might be used to compete with, rather than complement, the operations of the incumbent.

<sup>50</sup> *Second Report and Order* ¶ 443.

Committee chairmen.<sup>51</sup> While the *Second Report and Order*, which established LMDS service rules, was finally released on March 13, the Commission included in the order yet another further notice of proposed rulemaking -- the *Fifth Notice in this docket* -- this time seeking comment on geographic partitioning and spectrum disaggregation. The Commission also waited over a month and a half, until April 29, to publish the *Second Report and Order* in the Federal Register, thereby extending the time to file petitions for reconsideration until almost June.

A firm and public auction date, as well as crystallized and certain service rules, is crucial to the willingness of capital markets to make investments in LMDS firms, and to the ability of potential bidders to acquire auction financing.<sup>52</sup> If delegation to the Wireless Bureau was intended to accelerate the selection of an LMDS auction date, it clearly has not had that effect, since nearly three months have gone by since release of the *Second Report and Order* without an auction being scheduled. It is therefore critical that the Commission commit its immediate attention to expeditious resolution of the outstanding issues involving partitioning and disaggregation raised in the *Fifth Notice*, as well as the key issues raised on reconsideration, and set a fixed date for commencement of the LMDS auction at no later than six months from today.

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<sup>51</sup> Last summer, the Commission itself recognized the importance of immediately finalizing the LMDS service rules and authorizations, and of scheduling the auctions by the end of 1996. And earlier this year, Senator McCain and Representatives Bliley and Dingell urged the Commission to quickly resolve the LMDS rulemaking and get the auctions underway, noting that "[t]he Commission's inaction in scheduling an auction has deprived U.S. consumers of an innovative and low cost competitive alternative to existing telephone and cable systems." See Letter from Sen. John McCain of Arizona, Rep. Thomas J. Bliley, Jr. of Virginia, and Rep. John D. Dingell of Michigan to FCC Chairman Reed E. Hundt 1 (Feb. 11, 1997).

<sup>52</sup> See Gregory L. Rosston and Jeffery S. Steinberg, *Using Market-Based Spectrum Policy to Promote the Public Interest* at 20 (Jan. 1997) ("[i]f spectrum users and their financial supporters are not reasonably certain of the rules that will govern spectrum use, they will be less willing to invest in obtaining and developing the spectrum.").

## CONCLUSION

For all these reasons, the Commission should reconsider and revise the LMDS rules for (1) bidding preferences category thresholds for small businesses and very small businesses, and by adding an asset test for designated entity eligibility, (2) incumbent LEC and cable system in-region auction participation, (3) incumbent ownership attribution, and (4) convertible securities attribution held by incumbents, in order to achieve the revolutionary pro-competitive potential of LMDS as direct, facilities-based competition with incumbent LEC and cable system monopolies. The Commission should also, and at long last, set a firm schedule for the LMDS auction, by which the auction will commence, at the latest, within the next six months.

Respectfully submitted,

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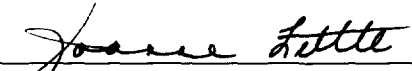
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### **CERTIFICATE OF SERVICE**

This is to certify that on this 29th day of May, 1997, a copy of the foregoing Petition for Partial Reconsideration of WebCel Communications, Inc. was served, by hand, on each of the persons listed on the attached Service List.

  
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